

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

VANBRO CORPORATION
Employer

and

LOCAL 175, UNITED PLANT AND
PRODUCTION WORKERS
Petitioner

Case No. 29-RC-11341

DECISION AND DIRECTION OF ELECTION

Vanbro Corporation, herein called the Employer, is engaged in manufacturing ready-mix concrete and asphalt concrete, recycling and reselling aggregates, and operating a dirt fill recycling center. Local 175, United Plant and Production Workers, herein called the Petitioner or Local 175, filed a petition under Section 9(c) of the National Labor Relations Act, seeking a self-determination election to determine whether the Employer's asphalt shipper¹ wishes to join Petitioner's existing unit of asphalt plant employees.²

A hearing was held before Sharon Chau, Hearing Officer of the Board, on May 25 and June 27, 2006.³ Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me.

¹ The asphalt shipper is also referred to as the asphalt dispatcher. These terms are used interchangeably throughout.

² Although the petition states that it seeks a unit of "employees residual to the existing asphalt plant unit certified in" Case No. 29-RC-10359, the Petitioner does not seek to represent all unrepresented employees of the Employer. One other employee classification, apart from the statutory exclusions of guards and supervisors, is also unrepresented, consisting of two concrete plant employees.

³ All dates herein are in 2006 unless otherwise indicated. On June 16, Building, Concrete, Excavating and Common Laborers, Local 731, Laborers' International Union of North America, herein called Local 731, which was the recognized collective bargaining representative of both the Employer's asphalt plant employees and asphalt shippers prior to August, 2005, was provided with notice that the hearing would reopen on June 27, 2006. Although Local 731 entered an appearance at the reopened hearing, it did not formally move to intervene and did not participate in the hearing. Accordingly, it appears from the record

The Employer takes the position that the case should be dismissed, because an election was held less than one year ago in Case No. 29-RC-10359, in which the asphalt plant shipper was excluded from voting. In addition, the Employer argues that the asphalt shipper lacks a community of interest with the asphalt plant employees. The Petitioner takes the contrary position. However, the parties agreed that the concrete plant employees, who are also unrepresented, lack a community of interest with the asphalt plant employees and should not participate in any self-determination election.

As its witness, the Employer called Cornelius (“Neil”) Vanderbilt, Jr., one of the Employer’s owners. The Petitioner’s witness was Mario Duarte, the asphalt shipper. Neither party filed briefs.

I have considered the evidence and the arguments presented by the parties. As discussed below, I have concluded that the petition should not be dismissed, that the asphalt shipper has a sufficient community of interest with the asphalt plant unit to warrant his possible inclusion in the unit through a self-determination election, and that the concrete plant employees lack a sufficient community of interest with the asphalt plant employees to require their inclusion in the unit, if the Petitioner does not seek to represent them. The facts and reasoning in support of my conclusions are set forth below.

FACTS

Background (Case No. 29-RC-10359)

that Local 731 never attained Intervenor status. Local 731 did not take positions on the issues raised at the hearing or indicate whether it was interested in representing the employee classification sought by the Petitioner (i.e., whether it wanted its name included on the ballot), or whether it was interested in representing the concrete plant employees. It did not enter into any stipulations or present evidence at the hearing.

In Case No. 29-RC-10359, Local 175 filed a petition to represent employees of the Employer in four separate bargaining units: (1) recycling, crushing and block plant employees, (2) asphalt plant workers, (3) asphalt plant shippers, and (4) sand and gravel shippers. At the time that the petition was filed, these four discrete units were covered by four separate collective bargaining agreements between the Employer and Local 1175, Laborers International Union of North America (LIUNA), herein called Local 1175, all effective from July 1, 2002, to June 30, 2005. Some time after those contracts were executed in 2002, Local 1175 LIUNA merged with Local 731 LIUNA, herein called Local 731, and the Employer recognized Local 731.

However, it came to the Region's attention after the hearing closed in Case No. 29-RC-10359 that the sand and gravel shipper unit and the asphalt shipper unit each contained only one employee. Because the Board cannot certify a bargaining representative in a unit containing only one employee, *Roman Catholic Orphan Asylum*, 229 NLRB 251 (1977); *Sonoma-Marin Publishing Co.*, 172 NLRB 625 (1968), the Petitioner withdrew the portion of its petition in which it sought to represent the asphalt shipper unit and the sand and gravel shipper unit. At that time, the Petitioner did not seek to combine either of these one-person units with any other unit, as it is now seeking to do in the instant case.

Accordingly, in Case No. 29-RC-10359, I directed an election in the two remaining units: the recycling, crushing and block plant unit, and the asphalt plant unit. Pursuant to the election, Local 731 was certified to represent the recycling, crushing and block plant employees, and Local 175 was certified to represent the asphalt plant workers. The composition of the two units is as follows:

Unit A -- Recycling, Crushing & Block Plants Unit

All full-time and regular part-time recycling, crushing and block plant employees, employed by Vanbro Corporation at its 1900 South Avenue, Staten Island, New York facility, including welders; repair and maintenance men; grease men; forklift, pay loader, platform and hi-lo operators; motor, generator, power equipment and all other yard equipment men; tool room men; and all other employees who handle any material by loading and unloading all trucks, freight cars, barges, boats and ships to docks or to any other of the Employer's property; also employees who perform the testing of all materials, the cubing stock piling, either by hand or by equipment, and employees who perform other miscellaneous skilled and unskilled duties in and around the plants owned and/or operated by Vanbro Corporation, but excluding office clerical employees, guards and supervisors as defined in the Act.

Unit B -- Asphalt Plant Workers' Unit

All full-time and regular part-time asphalt plant workers, including mixer men, repair men, grease men, welders, conveyor men, belt men, dust men, barge and boat trimmers, cleaner men, fork lift operators, Hilo operators, material yard workers and all other laborers, employed by Vanbro Corporation at its facility located at 1900 South Avenue, Staten Island, New York, but excluding office clerical employees, guards and supervisors as defined in the Act.

The Employer's Facility

Vanderbilt testified that the Employer's facility consists of 50 acres of waterfront property, to which deliveries of materials are made by means of barges. Buildings on the site include an office building, a garage, a concrete plant, an asphalt plant, and a crushing plant. The personnel who work in the office building include the owners, clerical staff, salesman, safety director, the asphalt shipper (also called the asphalt dispatcher) and the concrete shipper (also called the concrete dispatcher or sand and gravel shipper). Vanderbilt initially estimated that the asphalt plant is 1500 to 2000 feet away from the office, but he later revised this testimony, estimating that the distance from the dispatch office (which is in the office building) to the concrete plant is six or seven hundred feet,

and that it is another six or seven hundred feet from the concrete plant to the asphalt plant.

Employee Classifications Employed by the Employer and their Union Affiliation

As previously noted, the asphalt plant employees are currently represented by Local 175.⁴ The recycling employees, the concrete shipper and the salesperson are represented by Local 731. The asphalt shipper at issue in this case is currently unrepresented. Two concrete plant workers are also unrepresented, although one of the concrete workers was represented by the Mason Tenders in the past. The only other non-represented employees are the Employer's guards and safety director.

Vanderbilt testified that the ready-mix drivers are members of Local 282 (when testifying regarding the union affiliation of his employees, Vanderbilt generally referred to the local numbers only). He further indicated that the maintenance employees who repair the Employer's trucks are members of Local 15(c), the operators who operate the loaders are members of Local 15, and the asphalt plant engineer is a member of Local 14. The clerical staff belongs to Local 282 of an office workers' union. **Job Functions – Asphalt Plant Employees**

Vanderbilt testified that there are currently four employees working in the asphalt plant: the batcher, the grease man, the laborer, and the maintenance man.⁵ The greaser man applies lubricants to the operating equipment in the plant. The laborer cleans the

⁴Prior to August, 2005, the Employer's asphalt plant employees and asphalt plant shippers were represented by Local 731 and its predecessor, Local 1175. The expired contracts covering these two units were introduced into evidence. There is no record evidence regarding the existence or non-existence of any current contracts between the Employer and either Local 175 or Local 731.

⁵Although the unit description in Case No. 29-RC-10359 does not specifically include batchers and maintenance men, it includes all full-time and regular part-time asphalt plant workers, as well as "mixer men," a term synonymous with "batchers." There is no dispute that the batcher and the maintenance man are in the unit. Conversely, a number of job classifications set forth in the unit description became superfluous when asphalt plants became computerized.

plant and assists the grease man. The maintenance man is in charge of the maintenance of the plant. He performs troubleshooting work, and fabricates certain parts used in the maintenance or repair of equipment.

As for the batcher, Vanderbilt explained that he “comes in and turns on the burner that operates on an automatic mode and then he runs the plant and batches the asphalt,” controlling the production process⁶ from the control room. In addition, the batcher loads the customers’ trucks with asphalt, after telling the customers’ drivers where to position their trucks. Vanderbilt testified that the terms “batcher” and “mixer man” are synonymous, and that the batcher also performs the functions of the burner man. These functions were not specifically described.

It appears from the record that the asphalt plant unit also includes an individual or individuals known as “silo men,” a classification that is not specifically set forth in the unit description. Vanderbilt testified that storage silos are used to store hot asphalt. Duarte stated that he is in constant communication with the silo men with regard to the availability of asphalt products for sale and the need to order the raw materials for

⁶Vanderbilt described the production process for manufacturing asphalt as follows: “Material is taken in by barges, as I said, it’s loaded by crane into cold feed hoppers, those aggregates are fed onto a collecting conveyor, they go into a dryer where the material is dried to take the moisture out, it goes up a bucket elevator to a screen deck, it gets screened into different sizes, it’s weighed on—cumulatively on a scale of the aggregate and the asphalt is weighed on its scale and then mixed together to make asphalt.”

When asked what the batcher does when “running the plant,” Vanderbilt testified, “Well, it’s a process where you have to prepare to make the material 20 minutes ahead of time so that if it takes 20 minutes from start to finish to produce a batch...every minute you make another batch so if you’re going to make a certain mix you’ve got to pull the material from the coal feeds that you’re going to use, the proper sizes of stone and so on, that goes through the dryer, the elevator, the screen deck, and goes into the hot bins and then you have medium—in your hot bin, you have—to start the batch and that process takes about 20 minutes...he operates the plant to move the material so that it’s in the hot bins and ready to batch material. The hoppers are loaded by...the crane operator and his oiler on the dock. The crane operator’s responsible for loading the asphalt plant hoppers and the concrete plant hoppers. The material comes in by barge, he take it off the barge by bucket on the crane and puts it into all the hoppers we call ‘cold feeds.’ Then the operators at each plant take the material out of the cold feed through their production process, which they control in the control room, and utilize that to make the materials that they need.”

making asphalt. Thus, it would appear that the silo men are involved with the asphalt production process, and are part of the bargaining unit.⁷

Job Functions of Asphalt Shipper / Dispatcher and Contacts with Asphalt Plant Unit

The record reflects that when Mario Duarte, the asphalt shipper, arrives for work in the morning, he powers up the main computer to operate the asphalt plant, silos and truck scale.⁸ His job functions also include ordering the materials used in producing asphalt, taking customers' orders and creating a ticket in the Employer's computer system for each customer's order. The ticket is then "fed down" by modem to the asphalt plant. The asphalt plant workers prepare the order and load it onto the customer's truck. Next, the customer takes his truck to the scale to be weighed, and then returns to the dispatch office, where the customer's ticket is printed out and the asphalt dispatcher gives the customer the ticket to sign. The customer may pay by cash, credit card or check, or if the customer has an account, the account is billed.

Duarte asserted that he is "in constant contact with the batcher and silo men," by telephone, to make sure everything is operational and to let them know what to anticipate for the day. In addition, Duarte contacts the batcher and silo men regarding the asphalt products available for sale, and the raw materials that Duarte must order for the production of the asphalt. According to Duarte, he communicates with all of the asphalt

⁷ Duarte did not specifically indicate what the silo men's job duties are, and Vanderbilt did not testify at all regarding the silo men. According to Duarte, the job duties of the silo men are distinct from those of the batcher, and they are not performed by the same person. Although Vanderbilt testified that there are only four employees in the asphalt plant workers' unit, it is possible that the functions of the silo men are performed by the greaser, laborer and/or maintenance man. This would explain the apparent contradiction in the testimony of Duarte and Vanderbilt.

⁸ During his direct examination, Duarte was asked to describe a typical day between July 1, 2005, and December 31, 2005. The significance of this particular time period was not disclosed. Duarte subsequently affirmed that his job duties have not changed since that time period.

plant workers regarding these matters, and with respect to “what time they have to come in, you know, the following day, what’s expected the following day.” In addition, he goes down to the plant when there is a breakdown. He did not indicate how often this occurs, or what he does when there is a breakdown.

Vanderbilt confirmed that the asphalt shipper telephones the asphalt plant employees to give them instructions regarding customer orders and product availability. Vanderbilt has observed the asphalt shipper on the telephone “primarily with the batcher, because that’s who loads the trucks.” In addition, Vanderbilt stated that when the asphalt plant workers perform overtime, Robert Vanderbilt communicates this to the asphalt dispatcher, who then conveys this to the asphalt plant workers. In his initial testimony, Vanderbilt was “sure” that asphalt plant employees other than the batcher communicate with the asphalt shipper, but he later denied this.

Interchange Between Asphalt Shipper and Asphalt Plant Employees

Although Duarte has performed some of the functions of the asphalt plant workers in the past, he admitted that he has not worked in the asphalt plant at all in the last two years, and that he has worked there only infrequently in the last five years. The asphalt plant employees do not fill in for the asphalt shipper during his vacations. There is no record evidence of any permanent transfers.

The Concrete Shipper

Vanderbilt testified that the concrete shipper, also referred to as the concrete dispatcher or sand and gravel shipper, has functions similar to those of the asphalt plant shipper. As with the asphalt shipper, the concrete shipper sends customer orders down to the concrete plant by modem. The customer’s truck is then directed to the concrete plant,

where the order is filled. In addition, the concrete shipper orders materials used to make concrete, such as sand and stone.

According to Vanderbilt, the asphalt shipper and the concrete shipper fill in for one another during vacations. However, Duarte testified that this had not occurred during the last three years. Currently, according to Duarte, the salesman fills in for the concrete dispatcher, and “it would be up to the Vanderbilts to decide” who would cover for him (Duarte) when he is on vacation. Vanderbilt subsequently confirmed that the salesman sometimes fills in for the asphalt shipper. The salesman was employed as a concrete dispatcher in the past.

Concrete Plant Employees

After the concrete shipper sends customer orders down to the concrete plant by modem, the two concrete plant workers prepare the order.⁹ In addition, the two concrete workers are responsible for the maintenance of the plant. The concrete plant employees cover for one another when one of them is on vacation, since only one person is necessary to run the concrete plant.

Vanderbilt claimed that the asphalt plant workers and concrete plant workers have different skills, because they use different computer applications. There is no contact between the concrete workers and the asphalt shipper, or between the concrete plant workers and the asphalt plant workers.

⁹Vanderbilt testified that the concrete plant workers “see that order, the truck is sent down to go on to the plant and the order is filled by the – operating the console which weighs up the necessary amounts of sand and stone came to you – one scale, cement is weighed on another scale, water is another scale and then everything is batched into the truck and then they load the water tank or hydraulic unit.” Vanderbilt stated that the concrete plant consists of two different plants, each of which uses a different method of making and storing concrete.

Supervision

Vanderbilt testified that his partner, Robert Vanderbilt, supervises the asphalt plant employees, the asphalt shipper and the concrete plant employees. The record does not disclose who supervises the Employer's other employees. **Wage Rates**

Vanderbilt stated that the concrete plant workers are paid \$41.65 per hour. With regard to the wage rates for the asphalt shipper and asphalt plant workers, Vanderbilt testified that, "I can't remember exactly but the asphalt shipper and asphalt plant men, one is 37 and change, one is 38." The Petitioner's attorney then referred the Hearing Officer to the expired Local 1175 / 731 contracts, effective July 1, 2002 to June 30, 2005. During the final year of the Local 1175 / 731 contract, the wage rate for asphalt plant shippers was \$37.65 per hour. The wage rates for the asphalt plant workers ranged from \$38.37 per hour to \$38.57 per hour. Although Vanderbilt testified that everyone in the asphalt plant now earns the same wage rate, it appears from the record that the current wage rates for the asphalt plant workers (currently members of Local 1175) and the asphalt shipper are similar to what they were under the expired collective bargaining agreements with Locals 1175 and 731.

Duarte testified that he is paid on an hourly basis, with time and a half for overtime.

Hours

According to Vanderbilt, the concrete plant workers work from 8:00 a.m. until 4:30 p.m., but occasionally start work at 7:30 a.m. or even at 7:00 a.m. The record does not reflect what time the asphalt plant employees start or finish work. With regard to the

asphalt shipper, Duarte testified that on a typical day between July 1, 2005, and December 31, 2005, he would be instructed to start work at 6:00 or 7:00 a.m. He did not indicate whether his hours have changed since then. Both the asphalt plant employees and the asphalt shipper currently work a minimum 8-hour day, with overtime as needed and the same half-hour lunch break.

Vanderbilt testified that under the Local 1175 / Local 731 contract, which expired on July 1, 2005, the asphalt shipper had a guaranteed 10-hour day, whereas the asphalt plant employees had a guaranteed 8-hour day and worked overtime as needed. **Benefits**

The asphalt shipper and concrete plant workers currently receive health insurance benefits and participate in a 401(K) plan, whereas the employees in the asphalt plant do not enjoy these benefits. However, Duarte testified that when he was covered by the Local 731 collective bargaining agreement, his pension benefits, annuity program, vacation benefits and holidays were the same as those of the asphalt plant employees. **Uniforms**

According to Vanderbilt, employees in the asphalt plant wear blue uniforms, emblazoned with the name of the company. In addition, they wear special gloves and hats, and may wear safety-tipped shoes and other safety equipment. By contrast, the asphalt shipper wears street clothes, and does not wear steel-tipped shoes or other safety equipment.

Vanderbilt maintained that the concrete plant workers do not wear uniforms, but he did not indicate whether they wear safety equipment. **Time Clock**

The asphalt plant workers and asphalt shipper punch a time clock. The record does not indicate whether the concrete plant employees punch a time clock.

DISCUSSION

Employer's Motion to Dismiss

Pursuant to Section 9(c)(3) of the Act, a new election is barred only in a “bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.” For the purposes of Section 9(c)(3), employees who did not vote in an election held within the preceding twelve months because parties agreed to exclude them are not in the same “bargaining unit or any subdivision” as that within which the election was held, even if these employees are later added to the existing unit by means of a self-determination election. *S.S. Joachim And Anne Residence*, 314 NLRB 1191, 1192 (1994). Thus, a petition to conduct an election among employees excluded from voting in the previous election does not run afoul of Section 9(c)(3). *S.S. Joachim And Anne Residence*, 314 NLRB at 1192 (citing *Philadelphia Co.*, 84 NLRB 115 (1949)). In the instant case, the asphalt shipper was excluded from voting in the election in Case No. 29-RC-10359, and thus was not in the same bargaining unit as that within which the election was held. *S.S. Joachim And Anne Residence*, 314 NLRB at 1192. Moreover, there is no evidence that the Petitioner ever expressly promised or agreed to refrain from representing the petitioned-for voting group. *See Briggs Indiana Corp.*, 63 NLRB 1270 (1945). Accordingly, the Employer’s motion to dismiss this case is denied.

Appropriateness of Self-Determination Election in the Voting Group Sought

It is well settled that a labor organization seeking to add unrepresented job classifications to a bargaining unit it currently represents may do so by means of a self-determination election, in which employees in the unrepresented job classifications are given the opportunity to vote on whether they wish to become members of the existing bargaining unit. E.g., *Arcade Manufacturing Division of Rockwell Manufacturing Company*, 96 NLRB 116 (1951). Such a self-determination election is appropriate if the employees sought by the petitioner share a community of interest¹⁰ with employees in the established units represented by the petitioner, and the requested classifications were in existence prior to the certification of the established units from which they were excluded. *Budd Company Automotive Division, Detroit Plant*, 154 NLRB 421, 428 (1965).¹¹

In self-determination elections of this type, the voting group need not consist of all unrepresented employees. For example, in *Warner-Lambert Company*, 298 NLRB 993 (1990), the Board directed a self-determination election to permit the employer's packaging machine mechanics to vote on inclusion with a unit of maintenance and repair employees, who were represented by the petitioner. The employer's production

¹⁰The "community of interest" criteria applied by the Board in making unit determinations include "distinctions in skills and functions of particular employee groups, their separate supervision, the employer's organizational structure and differences in wages and hours, as well as integration of operations, and employee transfers, interchange and contacts." *Atlanta Hilton and Towers*, 273 NLRB 87, 90 (1984); see also *Seaboard Marine, Ltd.*, 327 NLRB 556 (1999). Additional relevant factors include fringe benefits and other working conditions, work location, degree of centralized control over the employer's day-to-day operations and personnel policies, and previous bargaining history (or lack thereof) at the Employer. See *J.C. Penney Company, Inc.*, 328 NLRB 766 (1999); *Transerv Systems, Inc.*, 311 NLRB 766 (1993); *Allied Gear and Machine Company, Inc.*, 250 NLRB 679 (1980).

¹¹In *Budd Company*, the Board also relied on the fact that no other union sought to represent the employees sought by the petitioner. *Budd Company*, 154 NLRB at 428. In the event that a rival labor organization seeks to represent the employees in a separate, residual unit, the Board may direct a self-determination election in which the unrepresented employees are given three options: to select the rival labor organization as a separate residual unit, to join the incumbent's existing bargaining unit, or to remain unrepresented. *Pennsalt Chemicals Corporation*, 119 NLRB 128 (1957).

employees were unrepresented, and had a community of interest with the employees sought (i.e., the packaging machine mechanics). There was evidence of permanent interchange, and the packaging machine mechanics' work was closely integrated with that of the production employees. In addition, the packaging machine mechanics and production employees had a shared time clock and locker facilities, separate from those of the maintenance and repair employees. Nonetheless, the Board found that the packaging machine mechanics shared a closer community of interest with the maintenance and repair employees than with the production employees, because the packaging machine mechanics and maintenance and repair employees were in one department under the same general supervisor, their skills and wage rates were more closely comparable, and there were no permanent transfers from packaging machine mechanic to production worker. Accordingly, the packaging machine mechanics were given the opportunity to decide whether they wished to be represented in the maintenance and repair employees' unit, while the production employees were excluded from the voting group. *Warner-Lambert*, 298 NLRB at 995-96.

Similarly, in *University of Pittsburgh Medical Center*, 313 NLRB 1341 (1994), the Board affirmed the direction of a self-determination election involving just a portion of the employer's skilled maintenance employees. The Employer consisted of several corporate entities that had recently merged, including Presbyterian University Hospital ("Presbyterian") and Montefiore Hospital ("Montefiore"). The Board held that it was appropriate to direct a self-determination election among the Employer's telecommunication specialists at Presbyterian, to give them the opportunity to choose whether to be represented as part of an existing unit of skilled maintenance employees at

Presbyterian. The Board found that the unit of all skilled maintenance employees at Presbyterian remained an appropriate unit, lacking a community of interest with the skilled maintenance employees at Montefiore because the Presbyterian unit was separately supervised, had no interchange or contact with the Montefiore employees, and had a long history of separate bargaining. *University of Pittsburgh Medical Center*, 313 NLRB at 1342-43. Accordingly, it was appropriate to direct a self-determination election in the petitioned-for voting group of telecommunication specialists at Presbyterian, but excluding the skilled maintenance employees at Montefiore. *Pittsburgh Medical Center*, 313 NLRB at 1343; *but see St. John's Hospital*, 307 NLRB 767 (1992) (self-determination election in which all unrepresented skilled maintenance employees had to be included in the voting group).

The Board has directed a number of self-determination elections in which voting groups consisting of just one unrepresented employee were given the opportunity to decide whether to be included in the existing unit represented by the petitioner. For example, in *Chrysler Corporation*, 194 NLRB 183 (1971), the Board directed an election in which the “machine operator B,” who was the only clerical employee in the industrial engineering department, was given the opportunity to decide whether to be included in an existing office clerical unit, with which she had a community of interest. In *Armour and Company*, 115 NLRB 515 (1956), the Board directed a self-determination election with respect to one employee, the office porter, to determine whether he desired to be included in the existing production and maintenance unit, with which he had a community of interest. The timekeeper and temperature reader continued to be excluded from the unit.

Similarly, in *Arcade Manufacturing Division of Rockwell Manufacturing Company*, 96 NLRB 116 (1951), the Board directed a self-determination election in which a one-person voting group consisting of a time-keeper, whom the Board found to be a plant clerical, was given the opportunity to decide whether to be included in an existing production and maintenance unit, from which all other clerical employees were excluded. In *The Enterprise Company*, 106 NLRB 798 (1953), the Board directed a selfdetermination election to determine whether one employee, a farm editor, desired to be included in an existing unit of editorial room employees.

In the instant case, the record reflects that the asphalt shipper has a sufficient community of interest with the asphalt plant workers to be included in the same bargaining unit, if he so desires. He is in constant telephone contact with members of the asphalt plant unit, the functions he performs are integrated with theirs, and he reports to the same supervisor. The wage rates for asphalt shippers and asphalt plant workers are less than a dollar apart.¹²

Although the two concrete plant workers could potentially be part of the same unit as the asphalt plant employees, if the Petitioner wished to represent them, their community of interest with the asphalt plant workers and asphalt shipper is not so overwhelming that their exclusion from the unit would render it inappropriate. Although the concrete plant workers report to the same supervisor as the asphalt plant workers and asphalt shipper, and their skills are similar to those of the asphalt plant workers, they work in a separate building and have no contact or functional integration with either the

¹² While there is some evidence that the asphalt shipper has a community of interest with the concrete shipper, represented by Local 731, Local 731 appeared at the hearing but did not indicate that it wishes to represent the asphalt shipper.

asphalt shipper or the asphalt plant workers.¹³ Historically, they were represented by a different union from the other employees at issue in this case.

Based on the foregoing, I have concluded that the asphalt plant workers unit, currently represented by the Petitioner, would remain an appropriate unit with the addition of the asphalt shipper, and the continued exclusion of the concrete plant workers. Accordingly, I shall direct an election in which the asphalt shipper alone shall be afforded the opportunity to decide whether he desires to be included in a unit with the existing unit of asphalt plant employees. In the event, the asphalt shipper votes for inclusion in the unit, the Petitioner will be the collective-bargaining representative of the combined unit, consisting of all of the Employer's full-time and regular part-time asphalt plant employees and asphalt shippers. If he votes against inclusion, the asphalt shipper will be deemed to have indicated the desire to remain unrepresented and the Petitioner will continue to represent the existing unit of asphalt plant employees.

CONCLUSIONS AND FINDINGS

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.
2. The parties stipulated that Vanbro Corporation, herein called the Employer, a corporation incorporated in the State of New York, with its office and principal place of business located at 1900 South Avenue, Staten Island, New York, has been engaged in the manufacture of ready-mix concrete and asphalt, and in reselling and recycling aggregates. During the past year, which period is representative of its annual

¹³ Since the functions of the concrete shipper are similar to those of the asphalt shipper, the concrete plant employees, in all likelihood, have a greater degree of contact with the concrete shipper, who is represented by Local 731. However, Local 731 has not indicated that it is interested in representing the concrete plant workers.

operations generally, the Employer purchased materials and products valued in excess of \$50,000 directly from points located outside the State of New York.

Based upon the stipulation of the parties, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act. The labor organization involved herein claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute an appropriate voting group:

All full-time and regular part-time asphalt shippers, but excluding all other employees and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the voting group found appropriate at the time and place set forth in the notices of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the voting group who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not

work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also

eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls.

Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by Local 175, United Plant and Production Workers Union.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). In order to be timely filed, such list

must be received in the Regional Office, One MetroTech Center North-10th Floor, Brooklyn, New York 11201 on or before **July 25, 2006**. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notices of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. The Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB No. 52 (1995). Failure of the Employers to comply with these posting rules shall be grounds for setting aside the elections whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C.

20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **August 1, 2006**. The request may be filed by electronic transmission through the Board's web site at NLRB.Gov but **not** by facsimile.

Dated: July 18, 2006, Brooklyn, New York.

Alvin P. Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201